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In The

Supreme Court of the United States

October Term, 1976

No. 76-1622

IN RE REINER INDUSTRIES, INC., DEBTOR.

MARCUS ROTTENBERG,

Petitioner,

vs.

IRVING SULMEYER, Trustee,

Respondent.

MARCUS ROTTENBERG,

Petitioner,

vs.

INTERNATIONAL FASTENER RESEARCH
CORPORATION,*Respondent.***PETITIONER'S REPLY BRIEF IN FURTHER SUPPORT
OF PETITION FOR A WRIT OF CERTIORARI**

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PRELIMINARY STATEMENT

This brief replies to the brief of respondent International Fastener Research Corporation ("IFR"), and supports the petition of petitioner Marcus Rottenberg ("Rottenberg") for a writ of certiorari.

The February 25, 1975 order (Appendix C to IFR's opposing brief) did not render moot the questions presented in the petition.

The Court is respectfully referred to Appendix C to IFR's opposing brief, which is a February 25, 1975 order claimed by IFR to render Rottenberg's petition moot.

After Rottenberg appeared in the proceeding between IFR and respondent Irving Sulmeyer ("Sulmeyer") underlying said order, IFR and Sulmeyer agreed in open court that said order be entered "without prejudice to the rights of Marcus Rottenberg" (Appendix C, pages 6 and 9). Rottenberg was then in the process of appealing from the orders ultimately giving rise to the petition for a writ of certiorari herein under consideration. That express reservation of Rottenberg's rights agreed to by IFR in open court plainly negates the "rendered moot" status now claimed by IFR. Moreover, Rottenberg's rights in and to the proceeds of the sale contemplated by said February 25, 1975 order were reserved therein.

Respondent IFR's brief glosses over, and in material part fails entirely to mention in its relation of the relevant facts, the surreptitious *ex parte* acts of respondent Sulmeyer, Trustee in Bankruptcy, accomplished on behalf of IFR which effectively deprived Rottenberg of property rights without constitutional due process.

The July 30, 1974 *ex parte* order allowed IFR to rescind a sale completed under the terms of a July 12, 1974 agreement

between IFR and Sulmeyer. Under that agreement, IFR was to pay \$862,000 to the Trustee for specified assets of the bankrupt, and to loan \$138,000 to the Trustee. The Trustee was to convey and deliver those assets to IFR and turn over the bankrupt's manufacturing facility to IFR for IFR's use and benefit. IFR paid the purchase price, made the loan and received the property on July 12, 1974. No other contract obligation remained to be performed. The agreement provision allowing IFR not to perform its contract obligations if the July 12, 1974 order did not become final on July 23, 1974 was rendered academic by said fully executed performance on July 12, 1974.

IFR's brief (page 5, lines 7-8) refers to an alleged subrogation agreement between IFR and Sulmeyer. This is the same alleged oral, contingent, retroactively effective, subrogation agreement which IFR has claimed had existed throughout Rottenberg's challenge below of the constitutionality of the July 30, 1974 *ex parte* order. Yet even the Bankruptcy Judge rejected the existence of such alleged agreement after argument, *sub silencio*, when he relied solely upon California equity law (Appendix A to Petition, page 4a) in upholding the subrogation rights created in the July 30, 1974 *ex parte* order in favor of IFR.

Rottenberg's legal status entitled him to constitutional procedural due process and his lien rights could not lawfully be affected by the inapplicable Bankruptcy Rule 802.

IFR's brief relies upon the Ninth Circuit's decision (Appendix B at 14a) which sets forth the general principle that it is impracticable for notice to be given to every creditor affected by bankruptcy orders.

However, in the case at bar, Rottenberg loaned money to the Chapter XI Receiver of Reiner Industries, Inc. ("Reiner"), never was a creditor of Reiner, was not involved in or with the

ensuing bankruptcy proceedings, and had no occasion or duty to keep abreast thereof by constant resort to the court files. Bankruptcy Rule 802 was inapplicable to him. Rottenberg's only interest was in being paid by Sulmeyer with proceeds of the consummated sale to IFR. That was to be accomplished in the adversary proceeding commenced by the Trustee on July 24, 1974. Rottenberg had every reason to believe that the July 12, 1974 order confirming the sale to IFR had become final on the last mentioned date. The Trustee, on behalf of IFR, continued to foster that belief by his letter to Rottenberg's attorney sent on July 29, 1974 and received on July 30, 1974. In that letter, the Trustee assured Rottenberg's attorney that he would be kept advised of all proceedings, and that the priorities among Rottenberg and Reiner's creditors in the sales proceeds and in Reiner's remaining assets would be determined in the hearing to take place on August 30, 1974. On the very same day, however, the Trustee was petitioning the court on behalf of IFR to rescind the sale, *ex parte*, so that Rottenberg would not find out about it.

CONCLUSION

Under these circumstances, it is respectfully urged that the petition for a writ of certiorari should be granted. Rottenberg's rights attached not only against Reiner's assets, but against the proceeds of sale thereof as well, and he can still be made whole.

Respectfully submitted,

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